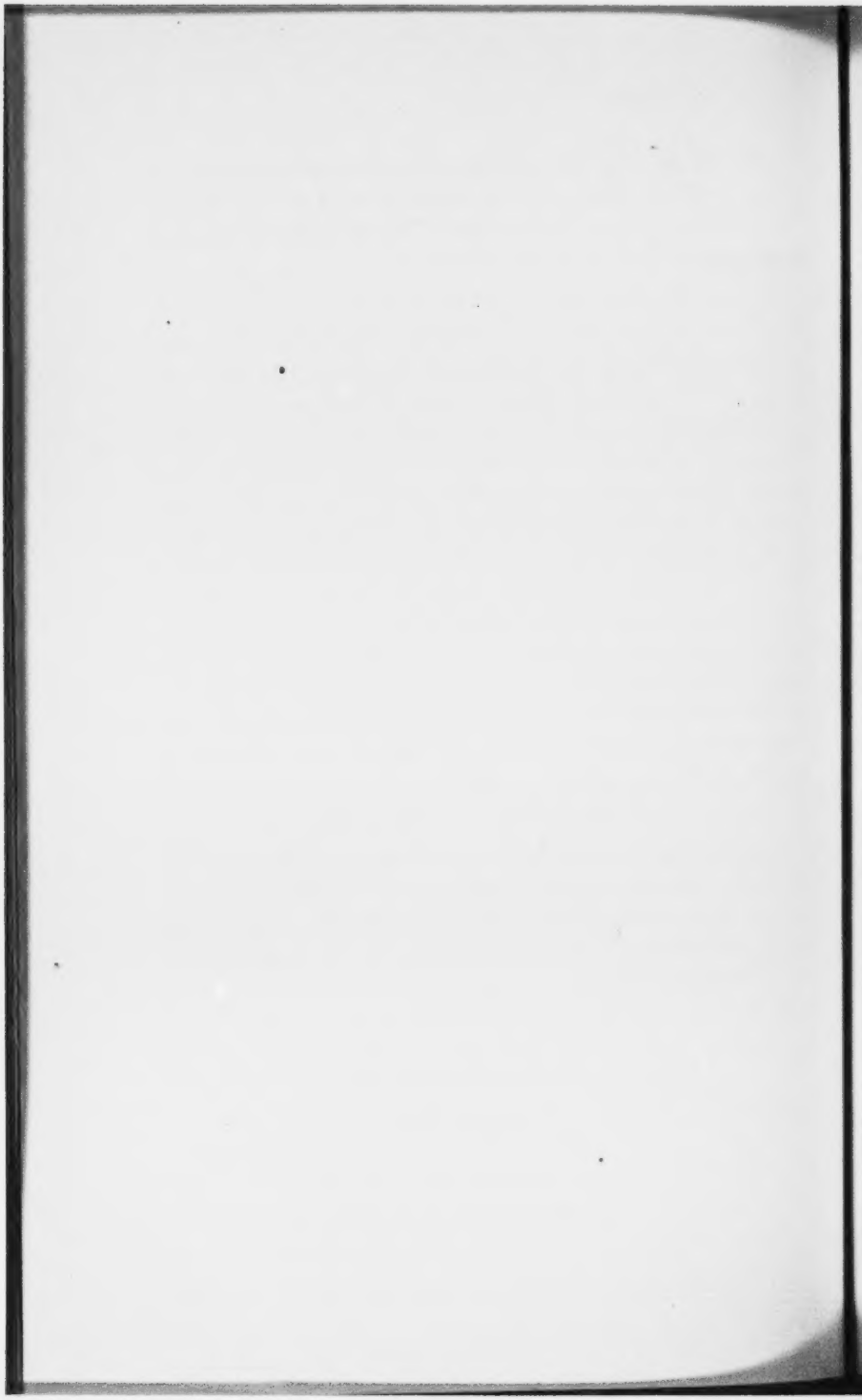

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 374

UNITED ENTERPRISES, INC.,
Petitioner,

vs.

ANNE DUBEY, EVA A. LOWTHER, and LEE ORA BROWN, Being and Comprising the Members of the Florida State Board of Beauty Culture Examiners,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

Summary

The petitioner instituted suit in the District Court of the United States for the Northern District of Florida, seeking a declaratory judgment against the respondents. The cause was presented to the District Court upon petitioner's

amended complaint (tr. 4), respondents' answer thereto (tr. 18), and a written agreed statement of facts composed by the parties (tr. 25). The District Court denied petitioner's application for a declaratory judgment and dismissed the complaint (tr. 58).

The petitioner took an appeal to the Circuit Court of Appeals, Fifth Circuit, and the appellate court affirmed the decision of the lower court (tr. 72), and petitioner filed a petition in the Supreme Court of the United States for writ of certiorari to the Circuit Court of Appeals.

Petitioner's Amended Complaint

The amended complaint (tr. 4) alleges that petitioner's sales practice is substantially this:

A prospective purchaser is approached by petitioner's sales representative in the purchaser's home or in a beauty shop and the merits and advantages of petitioner's products are explained. When desired by the customer, a demonstration is given her by the sales representative, without charge, in this fashion: A small portion of cold cream or facial cream is applied to the prospect's face, without massage, and this is promptly removed. A liquid skin softener is then applied and then removed. A powder base is then applied, then powder, rouge and lipstick are applied. The demonstration is without obligation on the customer's part, and petitioner's only profit is from the sale when made. The customer may or may not purchase. In giving the demonstration, no equipment is used except an ordinary straight chair and mirror (Paragraph III, Amended Complaint).

When a purchase is made, the sales representative fills out and signs, in duplicate, an order blank. This obligates

petitioner to deliver the merchandise to the purchaser by mail, C. O. D., direct from its plant in Evansville, Indiana. A deposit is paid to the sales representative, which constitutes a part of the purchase price, and is retained by the representative as her commission in full. The balance of the sales price is collected by postal authorities upon delivery of the C. O. D. parcel (Paragraph II, Amended Complaint).

It is also alleged that petitioner's sales representatives, in giving these demonstrations do not advertise or hold themselves out as being beauty culturists, cosmeticians or cosmetologists, or as giving any sort of beauty treatments or services (Paragraph IV, Amended Complaint).

It is averred that because of arrests and threats of prosecutions by the board, petitioner was forced to abandon its demonstrations; that previously petitioner's profits from its sales in Florida were more than $400 per month, and that, except for such interference by the board, it would have continued to do business in like volume thereafter. It is claimed that it is now impossible for petitioner to continue its business in Florida, unless relieved of the burden of the state statute, and that, therefore, more than $3,000 is involved (Paragraph VIII, Amended Complaint).

It is charged that the state statute is inapplicable to such activities since petitioner's demonstrators are not actually engaged in the practice of beauty culture, and, further, that the act places an unreasonable burden upon petitioner's interstate business (Paragraph VI, Amended Complaint).

Respondents' Answer

Respondents, by their answer (tr. 18), interpose four separate defenses to the amended complaint.

The first defense denies that the amount in controversy exceeds $3,000.

The second defense asserts that petitioner's "demonstrations" actually constitute the practice of beauty culture and, hence, are subject to the requirements of the Florida law; that the "demonstrations" are purely "local" transactions, and subject to regulation under the state's police power.

The third and fourth defenses assert that the district court is deprived of jurisdiction by the excepting provisos of 28 U. S. C. A. 41 (Subd. 1) as now amended.

Agreed Statement of Facts

In settlement of the issues presented by the pleadings, the parties have composed an agreed statement of facts (tr. 25). There, it is agreed that the allegations of the amended complaint concerning the amount and extent of petitioner's business in Florida, past and future, are true. It is obvious that this statement is designed to present the question of the court's jurisdiction over the amount in controversy.

Concerning the merits, the agreed statement of facts definitely fixes the nature and character of the "demonstrations" conducted by petitioner's sales representatives. There, it is agreed that the court is to determine the controversy between the parties upon the assumption that this is the method actually employed by petitioner's representatives:

"Plaintiff's sales representatives engaged a number of women to work as 'demonstrators' in various beauty shops in Florida where plaintiff desired to establish trade outlets for its said cosmetic products. These 'demonstrators' were first given a two weeks' course of training by the sales representatives in the application and use of plaintiff's merchandise upon prospective customers. They were then furnished with a 'kit' containing the creams and preparations necessary to the giving of the demonstrations hereafter described. The 'kit' also contained a spatula for removing the creams from the jars in which they were packed when giving the demonstrations and an eyebrow brush for applying 'make up' to the eyes of the customer, if requested. The 'demonstrator' was required to further equip herself with small cloths or towels to be used as headbands. These were arranged upon the customer to protect her hair from the preparations used in the demonstration.

"The sales representative and one of the 'demonstrators' then entered a beauty shop with this proposal to the shop owner or operator: The 'demonstrator' would remain in the shop for a short time, giving demonstrations of plaintiff's merchandise to prospective customers and promoting its sale. These would be drawn from women casually entering the shop or brought there by special appointment. In order to induce the prospect to buy, the 'demonstrator' would propose that she give to the prospect a demonstration in the use of the merchandise. The materials in the 'kit' were used. The prospect would be taken into one of the regular booths maintained in the shop for giving beauty treatments. She would

be placed in a reclining position in a regular reclining chair or couch, commonly known as a 'facial couch'. Towels (furnished by the shop) would be adjusted about the shoulders and body of the prospect. One of the 'demonstrators' headbands would be put in place. The demonstration then proceeded in this manner:

"(1) Plaintiff's merchandise, known as a cleansing cream, would be applied over the entire face with spreading and stroking movements, then all of it would be removed with tissue.

"(2) Another of plaintiff's preparations, known as a special throat cream and eye cream, would be placed over the throat and eyes.

"(3) The remaining portion of the face would be covered with another of plaintiff's preparations known as 'skin food'.

"(4) The face was then gently manipulated with the fingers.

"(5) Over this would be placed another of plaintiff's preparations consisting of a white cream or 'clay' and known as a 'beauty pack'. This was allowed to dry for eight or ten minutes.

"(6) It was then thoroughly removed with cloths soaked in warm water.

"(7) An astringent lotion or cream was then smoothed over the face.

"(8) The 'demonstrator' then applied 'make up' consisting of face powder, rouge on the cheeks and lipstick on the lips. If the customer desired, 'make up' was placed about the eyes.

"This entire process was conducted by the 'demonstrator' and the materials used were those manufactured by the plaintiff. It consumed from forty to forty-five minutes. It is what is known in the beauty trade as a 'facial' and is given for the purpose of beautification."

Judgment and Opinion of District Court

Upon this state of the record the District Court denied petitioner's application for declaratory judgment and dismissed the complaint, (tr. 58) and rendered an opinion (tr. 59) (*United Enterprises, Inc.*, v. *Dubey, et al.*, 42 *Fed. Supp.* 60), saying:

" • • • The paramount questions to be determined are two: first, has the court jurisdiction, and second, whether the police regulation sought to be enforced upon the plantiff is reasonable."

• • •

"As to the reasonableness of the police regulation prohibiting the giving of facials, there is abundant authority to the effect that the power of the Federal Government to regulate interstate commerce does not disable the states from adopting reasonable measures designed to secure the health and comfort of their people. Every state police statute in some manner will necessarily affect interstate commerce in some degree, but such a statute does not run counter to the grant of congressional power merely because it incidentally or indirectly involves or burdens interstate commerce.

"No showing has been made that plaintiff does not have a speedy and efficient remedy at law or in

equity in the courts of this state, or that the Florida act unreasonably interferes with plaintiff's rights to transact its business in interstate commerce.

"It is, therefore, the opinion of the court that it is without jurisdiction, but, were the opinion to the contrary the court holds that the Florida act under consideration is a proper exercise of the state's police power and that the regulation is reasonable.

"An order will be entered denying the motion for declaratory judgment and dismissing the complaint at the cost of the plantiff."

Judgment and Opinion of Circuit Court of Appeals

Upon an appeal taken by the petitioner to the Circuit Court of Appeals, the appellate court affirmed the decision of the lower court (tr. 72), and rendered an opinion (tr. 69), *United Enterprises, Inc.* vs. *Dubey, et al.*, 128 *Fed.* (2d) 843, and although the appellate court disagreed with the lower court as to the question of jurisdiction, it affirmed the case on its merits, saying:

" * * * The states of the union have never relinquished their sovereign power so to protect their citizens by appropriate legislation; they are only obligated to exercise their authority without encroachment upon powers delegated to the federal government and rights arising thereunder; and so long as a state statute, designed to promote and protect the public health, has a real and substantial relation to that purpose, is reasonable, and operates without discrimination between subjects of the same class, it is not violative of the Fourteenth Amendment.

"The Legislature of Florida plainly intended by this statute to prevent the spread of contagious diseases, to induce (fol. 73) cleanliness and sanitation, and to insure the adoption of healthful standards throughout the beauty culture industry, in the interests of the public welfare. The regulatory provisions of the statute are appropriate to the attainment of the legislative object, and are not arbitrary or unreasonable. From its very nature, the practice of beauty culture is essentially an intrastate business as localized in character as any exclusively personal-service enterprise. The fact that a regulatory statute of a state, otherwise valid under rigorous scrutiny, is, in an isolated instance, effective incidentally to burden interstate commerce, does not destroy its constitutionality."

The Petition For Writ of Certiorari

The petition for writ of certiorari in effect sets forth the trial proceedings in the District Court and the appellate proceedings in the Circuit Court of Appeals, and alleges that the Circuit Court of Appeals erroneously decided a federal question and that the Supreme Court has jurisdiction to review this case on writ of certiorari.

STATEMENT OF QUESTIONS INVOLVED

I.

DOES THE PETITION FOR A WRIT OF CERTIORARI PRESENT A FEDERAL QUESTION THAT WILL INVOKE THE JURISDICTION OF THIS COURT TO REVIEW THIS CASE ON WRIT OF CERTIORARI?

II.

DID THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRONEOUSLY AFFIRM THE JUDGMENT AND DECISION OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA ON THE MERITS OF THIS CAUSE OF ACTION?

ARGUMENT

I.

DOES THE PETITION FOR A WRIT OF CERTIORARI PRESENT A FEDERAL QUESTION THAT WILL INVOKE THE JURISDICTION OF THIS COURT TO REVIEW THIS CASE ON WRIT OF CERTIORARI?

Upon the question of jurisdiction, the petitioner relies upon the provisions of Section 240(a) of the Judicial Code of the United States and 28 U. S. C. A. 347 (a). The question of jurisdiction now involved, as the respondents understand it, is not merely the question of whether or not a district court had jurisdiction to try this case below, but whether or not the Supreme Court has jurisdiction to issue a writ of certiorari herein to the circuit court of appeals. In this respect, the respondents contend that the federal question presented by the petition for writ of certiorari is not a federal question such as would entitle the petitioner to a writ of certiorari; that Section 240 (a) of the Judicial Code of the United States should be read in connection with Rule 38, part 5, of the U. S. Supreme Court Rules. This rule provides that review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor, and, while neither controlling nor fully measuring the court's discretion, indicates and sets forth the character of reasons which will be considered. The petition fails to set forth a federal question which would come under any of the provisions of this rule.

There is a recognized distinction between writ of certiorari and appeal, and writ of certiorari was never intended to take the place of, and serve the same purpose as, an appeal. For the reasons set forth above, the petition for a writ of certiorari should be denied on jurisdictional grounds.

II.

DID THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRONEOUSLY AFFIRM THE JUDGMENT AND DECISION OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA ON THE MERITS OF THIS CAUSE OF ACTION?

Are Petitioner's "Demonstrations" Within the Purview of the Florida Statute?

In support of its argument that the activities of petitioner's agents constituted a part of an interstate transaction, and, hence, not subject to state regulations, petitioner cites the following authorities:

Board of Cosmetological Examiners, etc., v. *Gibbons*, (Ala.) 193 So. 116.

Baker v. *Daly*, 15 F. 2d 881.

State v. *Knight*, (W. Va.) 191 S. E. 845.

Opinions of Attorney General of Indiana, 1937, page 345.

Hoff v. *State*, (Del.) 197 Atl. 75.

State v. *Walker*, (Wash.) 92 Pac. 775.

Ex Parte Lucas, 160 Mo. 218, 61 S. W. 218.

Schneider v. *Duer,* (Md.) 184 Atl. 914.
Real Silk Hosiery Mills v. *City of Portland,* 268 U. S. 325, 69 L. Ed. 892.
Marx v. *Maybury,* 30 F. 2d 839.
Lawton v. *Steele,* 152 U. S. 133, 38 L. Ed. 385.
Smith v. *Texas,* 233 U. S. 630, 58 L. Ed. 1129.
Burns Baking Co. v. *Bryan,* 264 U. S. 504, 68 L. Ed. 813.
Weaver v. *Palmer Bros. Co.,* 270 U. S. 402, 70 L. Ed. 654.
Liggett v. *Baldridge,* 278 U. S. 105, 73 L. Ed. 104.

Only three of these (*Board of Cosmetological Examiners, etc.,* v. *Gibbons; State* v. *Knight;* and Opinion of Attorney General of Indiana) deal with issues growing out of "demonstrations". The other cases cited by petitioner concern questions entirely irrelevant to those presented in the case at bar, as brief reference thereto will demonstrate:

Baker v. *Daly,* 15 F. 2d 881, merely deals with an attack upon an act of the Oregon legislature known as the Cosmetic Therapy Law by persons who were "expert in waving the hair of females and earn their living thereby." It was contended that the law was arbitrary and unreasonable in that it grouped together different and unrelated callings or professions, and forbid citizens from following one of them without qualifying in all the others. On this ground the law was held invalid. No question of the right to give "demonstrations" was involved, nor are any of the objectional features of that act urged as permeating the provisions of the Florida statute. The case is not in point.

In *Hoff* v. *State,* (Del.) 197 Atl. 75. the validity of a Delaware statute regulating the practice of beauty culture

was before the court in a criminal case in which defendant was charged with engaging in business without a certificate of registration as required by the act. The court recognized the power of the legislature to regulate such a business upon principles of public health and safety. But, it held that the act in question exceeded that limitation. It was said that the implied power conferred upon the board of examiners to fix a standard by which beauty schools were identified was an unlawful delegation of legislative authority. It was further held that educational requirements and those of age and apprenticeship had no relation whatever to the public health and safety and, therefore, were beyond legislative fiat. For these reasons the act was held invalid. The court specifically renounced *People* v. *Logan,* 284 Ill. 83, 119 N. E. 913, relied upon as upholding the act. The Supreme Court of Florida, on the other hand, has adopted that decision as controlling.

State v. *Reeve,* 104 Fla. 196, 139 So. 817 (820).

In the latter case, the Supreme Court of Florida upheld a municipal ordinance of the city of Miami, regulating the practice of beauty culture.

If petitioner was urging the invalidity of the Florida statute the case of *Hoff* v. *State, supra,* might be relevant, but such is not the case.

In *State* v. *Walker,* 48 Wash. 8, 92 Pac. 775, 15 *Ann. Cas.* 257 (also cited in *State* v. *Reeve,* 104 Fla. 196, 139 So. 817, 820), it was simply held that a state statute regulating the barber trade was valid in so far as it related to the public health and safety. Regulations not designed to promote the public health and safety were declared to be beyond the state's police power. There is nothing in this case pertinent to the issues in the case now before the court.

A similar case is *Ex parte Lucas,* 160 Mo. 218, 61 S. W. 218. It was there merely held that the barber trade was a proper subject of legislative control, under the state police power.

In *Schneider* v. *Duer,* (Md.) 184, Atl. 914, the validity of an act regulating the barber trade was in question. The court said:

> "The occupation of barbering is a trade that may be subjected to police regulations, so far as the health and safety of the public is concerned."

In holding that the act in question, in its maze of regulations and requirements, exceeded this purpose and was, hence, invalid, the court again said:

> "Such an aggregation of regulations and requirements wrongfully interfere with or prohibit persons from engaging in this long established occupation. Many of them bear no relation whatsoever to the health future."

Provisions declared to be unreasonable related to restrictions upon places in which barbers might practice, revocation of licenses upon conviction for crime, revocation of licenses upon communication of contagious disease to another (the court pointed out that under this provision a barber might have his license revoked by unintentionally infecting another with a bad cold) and requirements for obtaining licenses unrelated to public health and safety. Neither is this decision pertinent except in case of an attack upon the validity of the Florida statute.

In *Marx* v. *Maybury,* 30 F. 2d 839 (District Court, State of Washington), it was held that a state statute regulating the occupation of barbers was invalid only in so far as

its provisions were concerned which stipulated that not more than one student apprentice shall be employed in any barber shop and requiring barber colleges to give courses of instruction, to be completed within six months, covering scientific fundamentals for barbering, etc. The case has no application to the one at bar.

Some of these decisions might be relevant if this was a case where petitioner was contending that it should be relieved of certain specified requirements of the act, claimed to be invalid. But, such is not the case. Petitioner does not offer to comply with provisions admitted to be reasonable. It says that its activities are entirely beyond the reach of any of the requirements. For instance, the act requires a beauty culturist to furnish a health certificate—a requirement admitted to be proper by all of the authorities. Yet, petitioner's representatives decline to comply with this provision. So, the cases dealing merely with specific provisions of legislation of this character are not in point.

Neither are the decisions from other jurisdictions, concerning the validity of such legislation, pertinent in the face of decisions of the Supreme Court of Florida, holding that the Florida statute now under consideration is a valid and proper exercise of the state's police power.

Gillett v. *Florida University of Dermatology,* (Fla.) 197 So. 852.

Gillett v. *Colson,* (Fla.) 198 So. 109.

In the former case, the Supreme Court of Florida said:

> "The legislature has the power to regulate trades or professions operating directly on the person, upon the theory that their operation affects the health,

comfort, safety and public welfare of the public, and especially is this true as to the occupation of a barber or beauty culturist."

Real Silk Hosiery Mills v. *Portland*, 268 U. S. 325, 69 L. Ed. 982, deals with a subject entirely unrelated to the right of petitioner's sales representatives to give "demonstrations" upon customers in Florida.

In that case a statute of the State of Oregon, requiring persons going from place to place soliciting orders for goods for future delivery, and receiving payment or any deposit in advance, to secure a license and give bond conditioned for final delivery of the goods ordered, was held invalid as unreasonably burdening interstate commerce.

Lawton v. *Steele*, 152 U. S. 133, 38 L. Ed. 385, has not the slightest application to the case at bar. In that case a statute of the State of New York protecing certain game fish within the state's jurisdiction and providing for the destruction of nets and other devices for their taking, was attacked as being an unconstitutional exercise of the state's police power. The Supreme Court of the United States held that the act was valid, saying that state law fixing the manner in which fishing in its waters shall be carried on is proper.

In *Smith v. Texas*, 233 U. S. 630, 58 L. Ed. 1129, a statute of the State of Texas making it a misdemeanor for any person to act as a conductor on a railway train without having previously served for two years as a freight conductor was held invalid as an infringement of the liberty of contract.

It is obvious that neither of these cases bears any relation to the public health.

In *Burns Baking Company* v. *Bryan*, 264 U. S. 504, 68 L. Ed. 813, the constitutionality of a statute of the State of Nebraska, fixing not only a minimum weight of loaves of bread but also their maximum weight, was in question. The statute was declared to impose *unreasonable* burdens upon interstate commerce in this respect:

> "For the reasons stated, we conclude that the provision that the average weights shall not exceed the maximums fixed is not necessary for the protection of purchasers against imposition and fraud by short weights, and is not calculated to effectuate that purpose, and that it subjects bakers and sellers of bread to restrictions which are essentially unreasonable and arbitrary, and is, therefore, repugnant to the 14th Amendment."

Hence, the statute was declared invalid.

In *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, 70 L. Ed. 654, a statute of the State of Pennsylvania prohibiting the use of "shoddy" in the manufacture of bedding was declared invalid. "Shoddy" is shown to be a material made from clippings and pieces of cloth, as well as second-hand garments, rags and the like. The court says:

> "Here, it is established that sterilization eliminates the dangers, if any, from the use of shoddy. As against that fact, the provision in question cannot be sustained as a measure to protect health. And the fact that the act permits the use of numerous materials, prescribing sterilization if they are second-hand, also serves to show that the prohibition of the use of shoddy, new or old, even when sterilized, is unreasonable and arbitrary."

Liggett v. *Baldridge,* 278 U. S. 105, 73 L. Ed. 104, involved the constitutionality of another Pennsylvania statute providing that a drugstore might not be owned except by a licensed pharmacist and, in the case of corporations, all of its members must be licensed pharmacists. The statute was held invalid, the court pointing out that it "deals in terms only with *ownership*". The court says this:

> "The claim, that mere ownership of a drugstore by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance. This is not enough; and it becomes our duty to declare the act assailed to be unconstitutional as in contravention of the due process clause of the 14th Amendment."

Neither do these cases seem pertinent to the issues now before the court.

Other authorities cited by petitioner and which appear to be more relevant since dealing with questions growing out of "demonstrations" will be discussed. They are:

Board v. *Gibbons,* (Ala.) 193 So. 116.
State v. *Knight,* (W. Va.) 191 S. E. 845, and
Opinions of the Attorney General of Indiana, 1937, page 345.

The facts in *Board* v. *Gibbons, supra,* are like those alleged in the amended complaint, but unlike those shown by the agreed statement of facts. A comparison of the allegations of the amended complaint and the statement of the court in that opinion, with the agreed statement of facts in the present case, will demonstrate immediately that the pleader, in drafting the amended complaint, was

more concerned with bringing its case within that decision (by alleging an identical state of facts as there shown) than with presenting to the court in the case at bar the state of facts as they actually existed and as now disclosed by the statement of facts.

The allegations in petitioner's amended complaint are:

> "That the sales practice pursued by the plaintiff through their representatives in the State of Florida is as follows: That the representative of the plaintiff approaches a prospective purchaser in the prospective purchaser's home or in a beauty shop wherein the relative merits and advantages of plaintiff's products are explained to the prospective purchaser by the representative of the plaintiff. When desired by the prospective purchaser, a demonstration of plaintiff's merchandise is given to the prospective purchaser of certain of the products which plaintiff sells, which said demonstration is given without any remuneration being received for it by the plaintiff or its representatives or anyone else, and it consists of the following things, and none other: A small portion of cold cream or facial cream is applied to the prospective purchaser's face, without massage, and this is promptly removed. A liquid skin softener is then applied and then removed. A powder base is then applied, then powder, rouge and lipstick are applied. The demonstration is without obligation on the customer's part whatsoever, and the only profit that plaintiff or its representatives make out of said demonstration is in the actual sale of any merchandise that the prospective purchaser may desire. After thus being shown the merchandise, a customer may or may not make a purchase. In giving this free demonstration of said

merchandise, no equipment is used except an ordinary straight chair and mirror."

The method employed by the "demonstrator" in *Board v. Gibbons, supra,* as disclosed by the court's opinion, was:

> "A cold cream is applied to the customer's face without massaging and this is promptly removed. A liquid skin stimulator is then applied to the customer's face with a small soft brush and allowed to remain on the skin some two or three minutes and is then removed with cold water. A powder base is then applied, then powder, rouge, eyeshadow on the eyelids, hand lotion, mascara on the eyelashes and lipstick on the lips. * * * The demonstration is without obligation on the customer's part whatsoever, and the only profit made by your petitioner or petitioner's employees is in the actual sale of any merchandise that the customer may desire. After thus being shown the merchandise the customer may or may not make a purchase. In giving this free demonstration of said merchandise no equipment is used except an ordinary straight chair and a mirror."

A comparison of this statement, with the allegations of petitioner's amended complaint, will leave no doubt but that the pleader resorted to the Alabama decision for its allegations of fact rather than to the circumstances of its own case. But, the facts in this case are not the same at all. In the Alabama case the demonstrations had no connection with beauty treatments. They were given in an establishment conducted solely as a place of dispensing cosmetics to the retail trade, and no place else. They were not given in a beauty shop, nor attendant with the

equipment usually employed there. The application of the cosmetic was casual, and only a straight chair and mirror were engaged. The "demonstration" was entirely incidental to the retail nature of the business conducted. They were not given for purposes of beautification. They were not "facials." Under this state of facts the court said:

> "But demonstrations, not carried to the point of a beauty treatment, commonly known as a 'facial' conducted with none of the equipment of the beauty parlor, nor held out as such treatment, solely to the promotion of sales, for which such demonstrations are admittedly helpful, a natural incident to the business, should not be held an evasion of the statute."

Such, however, is not the case presented to the court now. The agreed statement of facts shows an entirely different situation than that alleged in the amended complaint or dealt with in the Alabama case.

In the present case the "demonstration" is given to the public generally—those casually entering the shop or brought there by special appointment. The customer is taken into the "booth" and a "facial couch" and all equipment used in similar treatments by the ordinary beauty operator is employed. A "facial" is given. The treatment, according to the agreed statement of facts, is for the purpose of beautifying the customer. The same method, equipment, appliances and medications employed in every other similar operation is used. The "demonstration," regardless of its ultimate object is, in fact, a beauty treatment.

Why should the ordinary beauty operator, *in the sale of her services*, be required to adhere to the provisions

of the act, whereas, petitioner's "demonstrators", when doing the same thing, in the same way, in the same place and with the same equipment, lotions, creams, clays, etc., and when treating the public generally are to be excused simply because they are selling a product, rather than their services?

Logic, reason and common sense forbid such a construction.

In *State* v. *Knight*, (W. Va.) 191 S. E. 845, defendant was charged with unlawfully demonstrating cosmetics without having been licensed "as specifically set forth in the regulation adopted by the said State Committee of Barbers and Beauticians on the 11th day of March, 1935".

The regulation referred to was:

> "All demonstrators of cosmetics, permanent wave machines, and other items connected with the practice of beauty culture and barbering must be licensed as beauty operators before they work as demonstrators in the State of West Virginia."

The court said that such a regulation was unenforcible, since the legislature had not conferred authority upon the committee to adopt it. At this point the state abandoned the committee regulation and sought to uphold the conviction upon the theory that the statute created the offense without regard to the regulation. After pointing out that the statute referred only to the practice of barbering and beauty culture, and not to demonstrations, the court says:

> "The stipulation (the case was tried upon a stipulation as to the facts) does not show that a demon-

stration would necessarily involve this practice; so that the state would have us take judicial notice that it would do so. * * * Furthermore, we conceive that cosmetical demonstrations could be made to barbers and beauticians themselves, as well as to the laity, in such manner, and under such circumstances, as would not constitute a violation of the statute."

It proceeds to dispose of the case, however, upon the theory that the warrant charges no offense and, hence, cannot support conviction. This is said:

> "What the state really seeks is to have the conviction sustained upon the facts agreed, instead of upon the charge made. This is not permissible for the constitution requires that 'the accused shall be fully and plainly informed' of the offense upon which the state would convict."

That case is not very helpful. In the first place, it was decided upon the insufficiency of the charge. Whatever might have been said regarding the status of demonstrations under the act in question was pure dictum.

In the second place, the criticism regarding the failure of the "stipulation" to show the character of the demonstration is met in the instant case by a positive statement found in the agreed statement of facts before this court that the "demonstrations" were "facials" and given for the purpose of beautifying the customer.

Neither is the Opinion of the Attorney General of Indiana helpful, since it is now shown what state of facts, or what character of demonstration, was placed before him.

The case of *Luzier Laboratories* v. *Minnesota State* Board, (Minn.) 248 N. W. 664, upon which respondents rely, is "on all fours." There, plaintiff, a Missouri corporation, was engaged in the manufacture (and sale in Minnesota) of cosmetic products. It appears from the opinion that its sales representatives employed the identical sales method as was used by petitioner's "demonstrators" in the present case. The salesman solicited customers by telephone and established sales rooms in licensed beauty shops. In procuring orders the salesmen instructed the customer in the application of the merchandise by giving demonstrations on the customers as to how they were to be used. Orders were taken, and a deposit paid to the salesman, just as in the instant case. The Minnesota state board caused arrests to be made, and plaintiff sought an injunction.

The board answered that the salesmen employed the "practice of promoting sales by demonstrating the use of such goods by applying the same to the upper parts of the bodies of living persons who are prospective customers and patrons *for the purposes of beautification* by means of manual manipulation and otherwise" (italics added). It put in issue the allegations of the complaint that the salesmen did not violate the beauty culture law of that state. A demurrer to the answer was overruled and a temporary injunction was denied.

On appeal, the court held that such "demonstrations", when given for the purposes of beautification, were within the act. It was decided that the fact of the payment of a part of the purchase price to the salesmen, and the purchase of the merchandise, was sufficient under the act, since the compensation thereby contemplated need not

come directly from the one who receives the treatment to necessitate obtaining a license under its provisions.

It was also said by the court that:

> "We cannot see how the law interferes with the interstate commerce which plaintiff carries on in this state. It is free to sell its goods everywhere, but may not carry on the occupation of beauty culturist by its salesmen unless they are licensed."

This decision is in point, and should be decisive of every question raised in the present case.

Does the Statute Unreasonably Burden Interstate Commerce?

The respondents urge that the "demonstrations" are "purely local" transactions.

A simpler example will serve to illustrate. Florida has a law requiring drivers of automobiles to obtain "driver's licenses". Could it be contended with any degree of reason that a person who is engaged in the demonstration of an automobile to a prospective purchaser is excused from obtaining a driver's license simply because the sale of the automobile is an interstate transaction? Certainly not. Florida also has a law requiring doctors of medicine to take an "examination" and obtain a "license to practice medicine and surgery". Could it be contended with any degree of reason that a person who is engaged in the demonstration of surgical instruments to a prospective purchaser is excused from taking such "examination" and obtaining a "license to practice medicine and surgery" because the sale of such surgical instruments is an interstate commerce transaction, where

such demonstrations consisted of the performing of an operation? Certainly not.

The problem in the instant case is no different. The demonstration is merely to convenience the purchaser. It is only a mere incident to the sale. It is a separate, entire, and primarily local transaction from its inception to its conclusion.

One of the commonest known forms of state's rights under the sovereign power of a state is the exercise of the police power directed to the control of local conditions and exerted in the interest of the health and welfare of the citizens of the state. Practically every state police statute necessarily will affect interstate commerce in some degree, but the fact that a regulatory statute of a state, otherwise valid, is in an isolated instance effective incidentally to burden interstate commerce, does not destroy its constitutionality.

Bacon v. *Martin,* 305 U. S. 380;

Milk Control Board v. *Eisenberg Co.,* 306 U. S. 346;

Texas Co. v. *City of Tampa,* 100 F. (2) 347;

Gillett et al. v. *Florida University of Dermatology,* 197 So. 852;

Luzier Laboratories v. *Minnesota State Board,* 248 N. W. 664;

Gillett v. *Colson,* 198 So. 109.

A state, by legislation under its police power, may provide for the protection of the public health, the public morals, and the public safety, unless Congress has preempted the particular field in question or unless the state transcends its legitimate authority and undertakes

the regulation of interstate commerce by imposing burdens upon it.

Liggett Co. v. *Baldridge,* 278 U. S. 105;
Cloverleaf Butter Co. v. *Patterson,* —— U. S. ——.

The states of the union have never relinquished their sovereign power so to protect their citizens by appropriate legislation; they are only obligated to exercise their authority without encroachment upon powers delegated to the federal government and rights arising thereunder;

California Reduction Co. v. *Sanitary Reduction* Works, 199 U. S. 306;
House v. *Mayes,* 219 U. S. 270;
Watch Tower Bible & Tract Society v. *City of Bristol,* 24 Fed. Supp. 57, 305 U. S. 572.

So long as a state statute, designed to promote and protect the public health, has a real and substantial relation to that purpose, is reasonable, and operates without discrimination between subjects of the same class, it is not violative of the Fourteenth Amendment.

Missouri Pacific R. Co. v. *Humes,* 115 U. S. 520;
Watson v. *Maryland,* 218 U. S. 173;
Clason v. *Indiana,* 306 U. S. 459;
In re Wilshire, 103 Fed. 620.

A statute of the State of Maine providing that cosmetic preparations should be registered with the Department of Health was a valid exercise of police power and not an unreasonable burden upon interstate commerce.

Bourjois v. *Chapman,* 301 U. S. 183, 81 L. Ed. 1027.

A Kentucky statute imposing a tax on the receipt of cosmetics in the state by any retailer was held valid upon the theory that the word "receipt" was used in the sense that the articles had already been received by the retailer and were "now in use". It was held that the tax involved a local transaction and was not an unnecessary burden upon interstate commerce.

Bacon v. *Martin,* 305 U. S. 380, 83 L. Ed. 233.

A Virginia statute imposing a tax on peddlers was held valid as placing no unreasonable burden upon interstate commerce.

Caskey v. *Va.,* 85 L. Ed. 831, decided April 28th, 1941.

It was held that interstate commerce was not unreasonably burdened by a state statute fixing a maximum charge for handling and selling leaf tobacco, although practically all of the tobacco was shipped in interstate commerce.

Townsend v. *Yoemans,* 301 U. S. 441, 81 L. Ed. 1210.

A state statute prohibiting tobacco advertising on billboards does not violate the federal commerce clause notwithstanding posters shipped from another state.

Packer v. *Utah,* 285 U. S. 105, 76 L. Ed. 643.

Conclusion

The petition fails to present a federal question that will invoke the jurisdiction of the Supreme Court to review this case on writ of certiorari and the petitioner, likewise, has failed to disclose any authority for the issuance of the writ.

The decisions upon questions arising out of "demonstrations" of cosmetic preparations to induce purchase make a distinction between "demonstrations" which do not amount to beauty treatments (*Board* v. *Gibbons*, (Ala.) 193 So. 116) and those which do (*Luzier, etc.*, v. *Minn.*, 189 Minn. 151, 348 N. W. 664).

The agreed statement of facts shows that the "demonstrations" in the instant case are "facials", given for the purpose of beautification. Hence, the Luzier case is controlling.

Attention is called to the fact that the Florida statute requires all operators to furnish health certificates. This undoubtedly bears a real and substantial relation to the public health, safety and general welfare of the citizens of the state, yet petitioner contends that neither is this requirement applicable to its activities. State statutes exerted in the interest of the welfare of the state's citizens are upheld notwithstanding that they may incidentally involve or burden interstate commerce.

The respondents respectfully urge that the petitioner has failed to establish its right to writ of certiorari and the decision of the Circuit Court of Appeals, affirming the judgment of the District Court, is correct and should

be sustained, and that the petition for writ of certiorari should be denied.

Respectfully submitted,

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